STATE OF MICHIGAN

COURT OF APPEALS

MELISSA TRACY,

Plaintiff-Appellant,

v

MARK PETRENAS, SUSAN PETRENAS, and WALTER BAKER,

Defendants-Appellees.

UNPUBLISHED
August 2, 2005

No. 253104
Macomb Circuit Court
LC No. 02-003086-NO

Before: Borrello, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order that granted summary disposition to defendants and dismissed her premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff began living with defendants at their home in June 2001. A couple of months later she climbed into the attic above the garage to remove her personal belongings that were stored there, when she fell through the drywall ceiling and landed on the garage floor below. She suffered multiple serious injuries. Plaintiff filed the instant premises liability action against defendants, claiming that they were negligent in failing to warn her of, or protect her from, the dangerous condition. Defendants later moved for summary disposition on the ground that the danger was open and obvious, and therefore they had no duty to warn or protect plaintiff, who was a licensee at the time. The trial court granted that motion and dismissed plaintiff's suit.[1]

This Court reviews the trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 59; 680 NW2d 50 (2004). Under MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions, and any other documentary evidence to determine whether a genuine issue of material fact exists that would

[1] Although the trial court did not specify whether it was granting defendants' motion under MCR 2.116(C)(8) or MCR2.116(C)(10), it is clear from its ruling, and the fact that it considered documentary evidence in making that ruling, that it did so under the latter court rule.

require a trial. MCR 2.116(G)(5); *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [*Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).]

While the trial court should look at evidence submitted in the light most favorable to party opposing the motion, when the opponent fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. Typically, social guests are licensees who assume the ordinary risks associated with their visit. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000) (citations omitted).]

Stated simply, a premises possessor must warn a licensee of any hidden dangers the possessor knows or has reason to know of, if they present an unreasonable risk of harm and the licensee does not know or have reason to know of the hidden danger and the risk presented. *Kosmalski*, *supra* at 65. However, a possessor may be liable despite the open and obvious nature of the risk if "special circumstances" exist that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided. *Lugo v Ameritech*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

The test to determine whether a danger is open and obvious is an objective one—i.e., whether an average person of ordinary intelligence would have been able to discover the danger and the risk it presented upon casual inspection. *Abke v Vandenberg*, 239 Mich App 359, 361-362; 608 NW2d 73 (2000). The standard is that of a reasonably prudent person and only the condition of the premises, not that of the plaintiff, may be considered. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004).

In the instant case, all three defendants testified at their depositions that plaintiff was told, or acknowledged being told, not to go to the attic and that she promised not to do so. Plaintiff did not refute that testimony but only claimed that she could not remember the conversation about being told not to go into the attic. Plaintiff would have this Court hold that there was a genuine issue of material fact because she does not remember being warned of the danger by defendants. However, if the danger would have been open and obvious to an average person of ordinary intelligence, then defendants were not required to warn plaintiff of or protect her from such danger. *Mann*, *supra* at 328. We hold that the potential danger of walking in a darkened garage attic without a load-bearing floor should be apparent to an average person of ordinary

intelligence. *Abke, supra.* Defendants therefore had no duty to warn plaintiff of the open and obvious danger.

Plaintiff claims she had no reason to know of the danger because there were joists, or boards or sheets of wood across the joists, to hold the objects being stored in the attic. We disagree. Plaintiff presented no evidence from which she could reasonably believe that the wood spanned and covered all walking areas in the attic, or even that the joists or wood could bear her weight. Again, an average person of reasonable intelligence should have recognized the potential danger posed by the condition. *Id.*

Plaintiff states that her belongings were being held "hostage" by defendants and that she had to remove them herself. The items were placed in the garage attic by defendants with plaintiff's knowledge and consent. Plaintiff presented no evidence that defendants would not have removed the items, or allowed her to do so, if asked. There were no special aspects of the case that made the risk of harm unavoidable. *Lugo, supra.*

Affirmed.

/s/ Stephen L. Borrello
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly